Supreme Court, U.S.
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No. 97-_____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JERRY HOMER MASON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Doctrine of Federal Abstention mandate federal deferral of a criminal case when a state criminal action pre-exists?

PARTIES TO THIS ACTION

The parties to this Petition are Jerry Homer Mason, an incarcerated inmate who is serving a 135 month sentence.

The Respondent is the United States of America.

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15 United States v. Ross, 40 F.3d 144, 146 (7th Cir. 1994)

15 United States v. Frady, 456 U.S. 152, 167-68 (1982)

16 Heath v. Alabama, 474 U.S. 82, 89 (1985)

16 Westfall v. United States, 274 U.S. 256, 258 (1927)

16 United States v. Lanza, 260 U.S. 377, 382 (1922)

17 Strickland v. Washington, 466 U.S. 668, 687 (1984)

17 Hill v. Lockhart, 474 U.S. 52, 59 (1985)

STATEMENT OF JURISDICTION

This Court had a jurisdiction for a Petition for Writ of Certiorari, in that Jerry H. Mason was convicted in the United States District Court for the Western District of Kentucky at Bowling Green in Criminal Action No. 1:93-CR-25-H. An appeal to the Sixth Circuit Court of Appeals of a 28 USC § 2255 collateral petition was denied on April 11, 1996 by the Sixth Circuit Court of Appeals in Action No. 95-6122. A Petition for Re-hearing En Banc was filed timely on June 10, 1996, which Petition was denied by Order entered August 5, 1996, a copy of which is attached. The Supreme Court now has statutory authority to review this matter.

STATEMENT OF THE CASE

On August 12, 1993 the Movant was indicted by the Clinton Circuit Court, a state Circuit Court of trial jurisdiction, in indictment No. 93-CR-00016, for the offense of cultivating marijuana, which is a Class D felony under Kentucky law, allowing upon a plea or finding of guilt a sentence from 1 to 5 years in the penitentiary. That indictment charges certain conduct which occurred on or about the 28th day of May, 1993 in Clinton County, Kentucky, which is located in the western judicial district of the United States District Court.

On October 20, 1993, the Defendant entered a guilty plea to a felony charge before the Clinton Circuit Court according to the terms of the original indictment. On the exact day that the Movant's plea of guilty was entered in state court, a federal grand jury sitting at Bowling Green, Kentucky in and for the western district of the United States District Court indicted the Petitioner

for a violation of Title 21 USC § 841(a)(1) in a 2 count indictment. Thereupon, on November 16, 1993 the Movant's state Court counsel filed a Motion to withdraw the Clinton Circuit Court guilty plea, the Court there entering its Order on November 18, 1993, setting aside the guilty plea in the Clinton Circuit Court, which then allowed the federal indictment to proceed.

On March 14, 1994, the Movant plead guilty to both counts of the federal indictment pursuant to the terms of the written plea agreement. On July 16, 1994, the Movant was sentenced to 135 months on both counts of the federal indictment and this is the sentence under which he now labors.

The Movant did not seek an appeal directly of either his guilty plea or the sentence thereon to the United States Sixth Circuit Court of Appeals. However, on April 16, 1994, the Movant filed a Motion to vacate, set aside or correct a sentence pursuant to 28 USC §

2255, alleging that his federal conviction was in violation of the double jeopardy clause found in the Fifth Amendment of the United States Constitution and that his attorney's failure to raise that issue as a defense denied him effective assistance of counsel.

On August 3, 1994, the Federal District Court, which had taken his guilty plea, denied the Movant's Motion for collateral relief.

The Movant then filed an appeal to the Sixth Circuit Court of Appeals in action No. 95-6122, in an for the Sixth Circuit Court of Appeals in a pro se fashion. The Sixth Circuit Court of Appeals denied his Petition for relief.

It is unfortunate, but necessary, to point out that the original Petition to set aside his conviction for ineffective assistance of counsel was done pro se, as was his original appeal from the District Court's denial of that request for relief. Regrettably, Mr. Mason waited until

literally the last minute to retain counsel, who determined after a brief review that the only relief was a suggestion for Petition for review en banc to the Sixth Circuit Court of Appeals.

As this Court is aware, once the Court of Appeals makes a ruling on the merits for a Petition for collateral relief under § 2255, he in effect has basically exhausted his appeal, however, there is room for leave to file a Motion for suggestion for rehearing en banc, which was accomplished on June 10, 1996. For the first time in that Petitioner, the Doctrine of Federal Abstention, as set forth in Younger vs. Harris, was raised, albeit in a nearly untimely fashion.

The Supreme Court is now asked to review an issue that while raised at the very last moment was, counsel believes, timely raised and relevant for review.

STATEMENT OF ISSUE

The Movant does not specifically challenge any statue, treaty, rule or regulation, but does attack by lack of review the Federal Abstention Doctrine as set forth in Younger vs. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

ARGUMENT

While it must be candidly pointed out at the outset that the Federal Abstention Doctrine as espoused in Younger vs. Harris, 401 U.S. 37, 91 S.Ct. 746, was not raised until a suggestion for a Petition for rehearing en banc before the Sixth Circuit Court of Appeals by undersigned counsel, it is urged that the Court may conduct a de novo review of a District Court's lack of an abstention question, even though not raised below. Litteral vs. Bach, 869 F.2d 297 (6th Cir. 1989). The abstention required must as a threshold determined whether or not there is an ongoing state judicial proceeding and whether or not those proceedings implicate an important state interest and then, thirdly, whether or not there is an adequate opportunity in the state proceeding to raise constitution challenges to a state interest. Middlesex County Ethics Commission vs. Gardenstate Bar Association, 457 US 423, 102 S.Ct. 2515

(1982).

It is clear that the state Court by indicting the Movant for the same offense for which he was charged in the federal indictment did consider a valid a state interest at hand. Obviously, a violation of the laws of the Commonwealth of Kentucky is a valid state interest and a prosecution was initiated, the Movant arraigned and plead guilty, and presumably, but for the concurrent federal indictment, would have been sentenced under Kentucky law. The Doctrine of Federal Abstention as set forth in Younger vs. Harris sets forth mandate to permit State Courts to try state cases free from interference by the Federal Courts. The Movant has a right to expect that when prosecuted in a State Court that he is free from federal prosecution for the same exact acts and that he has a right to expect freedom from double prosecution as raised by his double jeopardy argument in the Court below that the Federal Court should be preempted and

abstain jurisdiction so as not to subject the Movant to the same ordeals as a federal trial. See Abney vs. United States, 431 US 651, 97 S.Ct. 2034 (1977). Indeed, if the criteria as noted above are met, the District Court must dismiss the action whether or not its jurisdiction to hear the case is raised in trial or not.

Citing Younger and Gilliam vs. Foster, 63 F.3d 287 (4th Cir. 1995), the Court stated that while the prohibition against Federal Court interference is not absolute, it is nonetheless strongly suggested that when an adequate State Court remedy is present that the Federal Court should abstain from exercising its jurisdiction.

The Courts in all the Circuits have recognized that a claim of violation of the double jeopardy clause is a preeminent example of one of the very few unusual circumstances justifying Federal Court intervention in a state proceeding. The State Court proceeding in this case

was taken in good faith based upon a reasonable certainty that the Movant had in fact violated Federal law and it indicted the Movant, offered the terms of a plea of guilty, and indeed a plea of guilty was had.

Curiously therefore, the Movant's interest in having his peace in the State Court criminal procedure was taken in good faith and the Federal Court should have declined to exercise any jurisdiction over an existing criminal matter which had resulted on the same day in a guilty plea to the original indictment in State Court. The District Court should have therefore declined to exercise jurisdiction in a federal indictment and allowed the State Court action to proceed to sentencing consistent with the strong federal policy of non-interference of pending state judicial proceedings.

It is submitted that the facts of this case do not maintain that level of "carefully circumscribed situations" that the Federal Court should disrupt an ongoing state

judicial process. While the Movant herein would concede that his counsel in fact did file a Motion to set aside the State Court guilty plea, it is submitted that this Court may review the appropriateness of the District Court's indictment at the outset and that by virtue of the double jeopardy claim being made in the Movant's collateral Petition for relief, said claim is not waived.

There is no question that a state proceeding was pending. In Federal Express Corporation vs. Tennessee Public Service Commission, 925 F.2d. 962 (6th Cir. 1991). There is also no question that the State Court proceeding was in place, which had resulted in a guilty plea to conduct the very same that resulted from the federal indictment the same day the guilty plea was taken.

Secondly, it can not be argued under any circumstances that there was not appropriate state interest. See Kelm vs. Hyatt, 44 F.3d. 415 (6th Cir.

1995). Since the application of the Younger doctrine is absolute, a third prong of the Younger test has also been satisfied, in that state procedures clearly allowed the Plaintiff below, that is the Commonwealth of Kentucky, the opportunity to litigate a violation of Kentucky's penal code which satisfies the third prong of the Younger test. See Parker vs. Commonwealth of Kentucky Board of Dentistry, 818 F.2d. 504 (6th Cir. 1987).

It is therefore respectfully submitted that the Federal Court should have declined jurisdiction at the very outset of the indictment and that the Movant herein has not waived his right to a collateral attack of the guilty plea in Federal Court by virtue of the abstention doctrine.

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APPENDIX

OPINIONS BELOW

NO. 6122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY H. MASON	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

BEFORE: MERRITT, Chief Judge, MILBURN, Circuit Judge; and O'MALLEY, District Judge.

This pro se federal prisoner moves for pauper status on appeal from a district court judgment denying his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The Commonwealth of Kentucky charged Jerry Homer Mason with cultivating marijuana. Mason pleaded guilty to the state charge on the same day that a federal grand jury returned an indictment charging him with possession with intent to distribute over 3,000 marijuana plans in violation of 21 U.S.C. § 841(a)(1) and manufacturing over 3,000 marijuana plants in violation of 21 U.S.C. § 841(a)(1). Mason pleaded guilty to both counts contained in the federal indictment. The district court sentenced Mason to 135 months in prison. Mason did not appeal.

In his motion to vacate sentence, Mason claimed that: 1) the district court convinced him in violation of his rights under the Double Jeopardy Clause of the Fifth Amendment; and 2) defense counsel rendered ineffective assistance of counsel in violation of his rights under the Sixth Amendment.

The district court concluded that Mason's double

jeopardy claim lacked merit and that defense counsel's assistance was not constitutionally defective. Therefore, the district court denied Mason's motion to vacate sentence. Mason appeals that judgment.

In his timely appeal, Mason reasserts the claims he set forth in the district court.

In order to obtain relief under § 2255 on the basis of a constitutional error, the record must reflect an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings. See Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 (1993); see also United States v. Ross, 40 F.3d 144, 146 (7th Cir. 1994) (applying Brecht to § 2255 motion to vacate).

Mason is barred from seeking relief on his first claim. This claim would have been but was not raised on direct appeal. Under these circumstances, in order to obtain review, Mason must demonstrate cause and prejudice to excuse his failure to raise his claim on

appeal. See United States v. Frady, 456 U.S. 152, 167-68 (1982). Mason has not demonstrated cause and none is otherwise apparent from the record. Furthermore, it is clear that Mason can show no prejudice as his claim is without merit for the following reason.

In support of his first claim, Mason contends that because he pleased guilty in state court, the federal conviction for the same conduct violates the Double Jeopardy Clause of the Fifth Amendment. The state and federal governments may punish the same conduct. Heath v. Alabama, 474 U.S. 82, 89 (1985) (citing Westfall v. United States, 274 U.S. 256, 258 (1927)). Although the Double Jeopardy Clause forbids successive prosecutions of a defendant for the same offense, no Fifth Amendment violation occurs where a defendant is prosecuted for the same act by both state and federal authorities. See United States v. Lanza, 260 U.S. 377, 382 (1922). Because the Commonwealth of Kentucky

and the federal government are separate sovereigns, Mason's state and federal convictions for the same offense do not violate his rights under the Double Jeopardy Clause. See Heath, 474 U.S. at 89. Thus, Mason's claim is meritless and cannot provide the prejudice required by the cause and prejudice analysis. See Frady, 456 U.S. at 167-68.

Mason's claim that he received ineffective assistance of counsel is without merit. To establish ineffective assistance of counsel, it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the trial unfair and the result unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). In the guilty plea context, Mason must show that a reasonable probability exists that, but for counsel's errors, he would have not pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Mason

contends that he received ineffective assistance of counsel because his attorney moved to withdraw the state court guilty plea and thus deprived him of a double jeopardy defense. As it has already been shown that Mason's double jeopardy claim is without merit, he was not prejudiced by any allegedly deficient performance by defense counsel.

Accordingly, we hereby grant Mason in forma pauperis status for the limited purpose of review on appeal and affirm the district court's judgment. Rule 9(b)(3), Rules of the Sixth Circuit.

APPENDIX

NO. 95-6122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JERRY H. MASON	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellee.	)	

BEFORE: MERRITT, Chief Judge, MILBURN, Circuit Judge; and O'MALLEY, District Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for

rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly the petition is denied.

APPENDIX

ARGUMENT - MOTION FOR EN BANC REVIEW

The Younger vs. Harris Doctrine of Federal Abstention should have been raised pre-plea and/or in a direct Appeal and/or in a 2255 Petition and should not be deemed waived. Younger vs. Harris, 401 U.S. 37, 91 S.Ct. 746.

At the outset, undersigned Counsel reminds himself and the Court that the issue of Federal Abstention has not been raised at any point prior to Counsel's involvement, although the Petitioner would urge the Court not to ignore a matter that may bring the issue of Federal jurisdiction into question, despite such issue not having been raised to this point. See Thermice Corp. vs. Vistron, 832 F.2d 248 (3rd Cir. 1987). Assuming for the moment that the issue of not having raised this matter previously is one which may affect jurisdiction and therefore can not be waived, Counsel would urge review of the Younger

Abstention Doctrine.

As the Court is aware, the Younger Abstention Doctrine requires a Federal District Court to abstain from exercising jurisdiction if the criteria set forth therein are all met:

1. The State judicial proceeding must be ongoing;

2. The State proceedings must implicate an important State interest; and

3. The State proceeding must offer an adequate opportunity to litigate the Federal constitutional issues. See Kenneally vs. Bungreen, 967 F.2d 329 (9th Cir. 1992).

It is submitted that even thought there are limited exceptions to the Younger Abstention Doctrine, the facts contained in this Petition do not fit within those exceptions.

Hence, this Court is asked to review the facts of

this situation to determine that, in fact, all three Younger elements are present and that the matter warrants review.

Was there a State judicial proceeding ongoing? Obviously, there was. The Defendant/Petitioner had originally been charged in the Clinton Circuit Court with a violation of Kentucky State Law arising out of the very same facts which resulted in the indictment and guilty plea in Federal Court. The allegations contained in the State Court indictment were that the Petitioner in Clinton County, Kentucky manufactured marijuana in violation of Kentucky law. It is obvious that the State Court proceedings, and indeed the Trial Court, was aware of the possibility of an ongoing Federal investigation, as the Joint Appendix reflects two hearings where reference to same was made on the record. Ultimately, the Defendant entered a guilty plea to the State Court proceeding, which is the centerpiece of any criminal case, which results in

the finding of guilt by a trier of fact or entry of a guilty plea. Clearly, the element No. 1 of the Younger Abstention Doctrine is in place, as noted by the record herein.

Was the State proceeding indicative of an important state interest? As the United States has stated in its various Briefs in opposition to the pro se Petitions filed by the Petitioner herein, the Kentucky State Police acting in a conjunctive effort with other law enforcement agencies to eradicate the growing of and sale of marijuana, televised the Petitioner near a field containing literally thousands of growing marijuana plants. Clearly, the State has an interest in prohibiting its citizens from manufacturing and trafficking in marijuana, and this is a recognized State interest clearly.

Thirdly, did the State proceeding offer an adequate opportunity to litigate Federal constitutional issues? The only constitutional issue involving the State proceeding,

along with the Federal proceeding, was whether or not the Defendant would be appropriately punished for his conduct, as allegedly having violated the Kentucky Revised Statutes. It is submitted that since the Defendant was changed in State Court with a violation that could wind up with his imprisonment of one to five years in a State penitentiary, that the issues concerning his criminal culpability were and, in fact, could be adequately disposed of by a guilty plea to a felony in the Clinton Circuit Court, which, of course, did occur. Taken as a whole, the Younger Abstention Doctrine mandates a dismissal of the Federal District Court indictment.

Since the Younger vs. Harris Doctrine was first announced, the Supreme Court seems to have been firm in requiring its holding to be followed. In a related case where criminal proceedings in the State Court had not even been instituted against Plaintiff's in Federal District Court who sought an injunction, the Court nevertheless

held that when the State complaint is filed after the action in District Court has begun, but before any Federal proceedings of substance have occurred, that the Younger provisions apply in full force. Here the case is even stronger for the Abstention Doctrine, as when the Federal case was begun by indictment the State proceeding had already resulted in an arraignment, a pre-trial conference and a guilty plea, so that clearly the State action had been initiated, pursued and maintained. See Hicks vs. Miranda, 422 U.S. 332, 95 S.Ct. 2281 (1975). Since this case does not involve a constitutional attack on a Federal law or doctrine, the third prong of the Younger test really does not have the normal significance attached with it. A judicial proceeding was initiated, advanced and litigated nearly to its conclusion, only without an actual sentencing to the same conduct sought to be punished by the Federal District Court indictment and prosecution.

There is no question that the Younger Abstention

Doctrine rests on strong Federal policy, noninterference with State judicial proceedings which are ongoing. The Federal Court should not disrupt ongoing State judicial process, either by preempting the adjudication of same, nor by direction by the Federal District Court to stay or dismiss its proceedings. See In Re Grand Jury proceedings, 654 F.2d 268 (3rd Cir. 1981).

Again, understanding the extraordinary nature of the remedy which is now sought by retained Counsel literally at the last instant by the Petitioner, the Court is urged to review Simopoulous vs. Virginia State Board of Medicine, 644 F.2d 321 (1981), Garden State Bar Association vs. Middlesex City Ethics, 643 F.2d 119 (1981) and a Ninth Circuit case Ft. Belknap Indian Community vs. Mazurek, 43 F.3d 428 (9th Cir. 1994).